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9

10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF OREGON**

12 **Cathy DeForest, Leon Pyle**  
13 **and Edward Kerwin**

14 **Case No. 11-3159-CL**

15 **Plaintiffs**

16 **v.**

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**COMPLAINT**  
**for violations of the**  
**Resource Conservation**  
**Recovery Act (42 U.S.C.**  
**6901 et seq.), Clean Water**  
**Act (33 U.S.C. 1365**  
**et seq), Endangered**  
**Species Act(16 U.S.C.**  
**section 1531 et seq.) and**  
**for Public and Private**  
**Nuisance, Trespass,**  
**Negligence, Negligence**  
**Per se and Violation of**  
**ORS 468B.050**

**City of Ashland,( a municipal subdivision of**  
**the State of Oregon) Ashland Gun Club,**  
**Inc., (a Domestic Non Profit Corporation)**  
**and Chuck Partier, Bill Longiotti, Rick**  
**Georgeson, Lee Tuneberg, Mel Winner,**  
**Raymond Renteria and Jerry Wisdom**  
**(board members of the Ashland Gun Club**  
**Inc.), as individuals**

**Defendants**

*Complaint - Cathy DeForest, Leon Pyle and Edward Kerwin v. City of Ashland,  
Ashland Gun Club Inc., Chuck Partier, Bill Longiotti, Rick Georgeson, Lee Tunrberg,  
Mel Winner, Raymond Renteria and Jerry Wisdom*

1       1. This action is a citizen suit brought pursuant to Section  
2       505 of the Federal Water Pollution Control Act (commonly  
3       known as the Clean Water Act), 33 U.S.C. Section 1365. This  
4       action is also a citizen suit brought pursuant to Section  
5       7002(a)(1)(B) of the Solid Waste Disposal Act as amended by  
6       the Resource Conservation and Recovery Act, 42 U.S.C Section  
7       6972 (a)(1)(B). Thirdly, this action is a citizen suit brought  
8       pursuant to section 11 of the Endangered Species Act, 16  
9       U.S.C. 1540 (6)(g). This action also includes supplemental  
10      claims for private and public nuisance, trespass, negligence and  
11      a state water pollution control claim.

12       2. The City of Ashland leases land it owns to the Ashland  
13      Gun Club Inc. The land is located at 555 Emigrant Creek Road,  
14      Ashland, Oregon, about two miles east of the City proper.

16       3. Defendants have discharged and continue to discharge  
17      pollutants from point sources to the waters of the United States  
18      without a National Pollution Discharge Elimination System  
19      (NPDES) permit, a violation of Section 301 (a) of the Clean  
20      Water Act, 33 U.S.C. Section 1311(a). Plaintiff City has also  
21      filled wetlands without the required permit, also a violation of  
22      Sections 404 and 301 (a) of the Clean Water Act, 33 U.S.C.  
23      Section 1311(a). Plaintiffs seek a declaratory judgment,  
24      injunctive relief, the imposition of civil penalties, and award of  
25      costs, including attorney and expert witness fees. Defendant's  
26      unpermitted discharges are in violation of an "effluent standard  
27      or limitation" under Section 505(a)(1)(A) of the Clean Water Act,  
28      33 U.S.C. Section 1365(a)(1)(A).

1           4. Defendants have discharged and continue to discharge  
2 pollutants into Emigrant Creek and connected wetlands that  
3 constitute a "take" of threatened Coho salmon. Defendants do  
4 not have a permit for this "take" of Coho salmon, as required by  
5 Section 10 of the Endangered Species Act, 16 U.S.C. Section  
6 1539. Plaintiffs seek a declaratory judgment and injunctive relief  
7 as authorized by Section 11 (g) (1) (a), 16 U.S.C. Section 1540,  
8 the imposition of civil penalties as authorized by Section 11 (a)  
9 (1), U.S.C. Section 1540 and award of costs, including attorney  
10 and expert witness fees as authorized by Section 11 (g) (4), 16  
U.S.C. Section 1540.

11  
12           5. Defendants have contributed to and continue to  
13 contribute to the past and present handling and disposal of solid  
14 and/or hazardous waste which presents an imminent substantial  
15 endangerment to health and/or the environment, in violation of  
16 42 U.S.C. Section 6972(a)(1)(B). Plaintiff seeks a declaratory  
17 judgment, injunctive relief and the award of costs, including  
18 attorney and expert witness fees.

19  
20           6. Defendants violated the Oregon Water Pollution Control  
21 law (ORS chapter 468B.005 to 468B.035) in its operation of its  
22 shooting range, by causing pollution into waters of the State of  
23 Oregon.

24  
25           7. This Court has subject matter jurisdiction over the claims  
26 specified in this complaint, pursuant to 33 U.S.C. Section  
27 1365(a), 42 U.S.C. Section 6972(a), and 28 U.S.C. Section  
28 1331. This Court also has supplemental jurisdiction over  
Plaintiff's state law claims, nuisance, negligence and trespass

1 claims pursuant to 28 U.S.C. Section 1367. The relief requested  
2 is authorized pursuant to 33 U.S.C. Section 1319 and 1365(a),  
3 42 U.S.C. Section 6972, and 28 U.S.C. Sections 2201 and 2202.

4  
5 8. On or about August 29, 2011, Plaintiffs gave notice of  
6 the Clean Water Act violations specified in this complaint and of  
7 its intent to file suit to the Administrator of the U.S.  
8 Environmental Protection Agency (EPA), to the Regional  
9 Administrator of the EPA, to the Oregon Department of  
10 Environmental Quality (DEQ), to Defendants and to Defendant's  
11 registered agent, as required by Section 505(b)(1)(A) of the  
12 Clean Water Act, 33 U.S.C. Section 1465(b)(!)(A).

13  
14 9. More than sixty days have passed since notice was  
15 served, and the Clean Water Act violations complained of in the  
16 notice are continuing at this time or reasonably likely to  
17 continue. Neither the EPA nor DEQ has commenced or is  
18 diligently prosecuting a civil or criminal action to redress the  
19 violations.

20 10. Defendants remain in violation of the Clean Water Act.

21  
22 11. On or about August 29, 2011, Plaintiffs gave notice of  
23 the Solid Waste Disposal Act violations specified in this  
24 complaint and of its intent to file suit to the Administrator of the  
25 U.S. Environmental Protection Agency (EPA), to the Regional  
26 Administrator of the EPA, to the Oregon Department of  
27 Environmental Quality (DEQ), to Defendants, and to Defendant's  
28 registered agent, as required by Section 7002(b)(2)(A) of the  
Solid Waste Disposal Act , 42 U.S.C. Section 6972(b)(2)(A).

1  
2       12. More than ninety days have passed since notice was  
3       served and the Solid Waste disposal Act violations complained  
4       of in the notice are continuing at this time or likely to continue.  
5       Neither EPA, nor DEQ has commenced or is diligently procuring  
6       a civil or criminal action to redress the violations.

7  
8       13. Defendants remain in violation of the Solid Waste  
9       Disposal Act.

10  
11       14. On or about August 29, 2011, Plaintiffs gave notice of  
12       the Endangered Species Act violations specified in this  
13       complaint and of its intent to file suit to the Administrator of the  
14       National Oceanic and Atmospheric Administration, to the  
15       Assistant Administrator for Fisheries, NOAA Fisheries (NOAA),  
16       to Defendants, and to Defendant's registered agent, as required  
17       by Section 16 U.S.C. 1540 (a)(6)(g)(2).

18  
19       15. More than sixty days have passed since notice was  
20       served and the Endangered Species Act violations complained  
21       of in the notice are continuing at this time or likely to continue.  
22       NOAA has not commenced, nor is NOAA diligently prosecuting  
23       a civil or criminal action to redress the violations.

24  
25       16. Defendants remain in violation of the Endangered  
26       Species Act.

27  
28       17. Venue is appropriate in the Federal District Court for the  
District of Oregon pursuant to Section 505(c)(1) of the Clean  
Water Act, 33. U.S.C. Section 1365(c)(1); Section 7002(a) of the

1 Solid Waste Disposal Act, 42 U.S.C. Section 6973(a); Section  
2 16 U.S.C. 1540 (a)(6)(g)(1)(C) and 28 U.S.C. Section 1391  
3 because the source of the violations is located within the District  
4 of Oregon.

5 **PLAINTIFFS**  
6

7 18. Plaintiff Edward Kerwin owns land near to land owned by  
8 Defendant City of Ashland, on which Defendant Ashland Gun  
9 Club Inc. operates a shooting range.

10 19. Plaintiff has standing in this suit to protect his own  
11 interests. Plaintiff's interests are adversely affected by  
12 Defendant's discharges to water, which degrade the receiving  
13 waters as fish and wildlife habitat, recreational resources, and  
14 sources of aesthetic benefits. Plaintiff's interests are adversely  
15 affected by Defendant's handling and disposal of lead shot and  
16 lead bullets, which degrade Plaintiff's property and Defendant's  
17 property as fish and wildlife habitat, recreational resources and  
18 sources of aesthetic benefits.

19  
20 20. The interests of Plaintiff Kerwin have been adversely  
21 impacted as described in paragraph 21 below.

22  
23 21. The recreational, health, aesthetic, environmental and  
24 economic interests of Plaintiff Kerwin have been, are being, and  
25 will be adversely affected by Defendant's unpermitted  
26 discharges of lead into the ground and water and waste  
27 handling and disposal practices. Plaintiff uses, enjoys and  
28 recreates along Emigrant Creek and Bear Creek and their  
tributaries in the immediate vicinity of and downstream from,

1 defendants City of Ashland's property which is leased to the  
2 Ashland Gun Club Inc. Defendant's discharges, adversely affect  
3 Plaintiff Kerwin's interests, including but not limited to, the  
4 following:

- 5 (a) Plaintiff Kerwin has an aesthetic interest in the natural  
6 beauty and biodiversity of the receiving waters in the vicinity of  
7 and downstream from Defendant's discharges.
- 8 (b) Plaintiff Kerwin observes and enjoys wildlife in and  
9 around his property in the immediate vicinity of locations where  
10 Defendant has disposed of lead shot and lead bullets in the land  
11 and water;
- 12 (c) Plaintiff Kerwin has an aesthetic interest in the natural  
13 beauty and biodiversity of his property and its surroundings.
- 14 (d) Plaintiff Kerwin observes and enjoys wildlife in and  
15 around Emigrant Creek and its tributaries in the immediate  
16 vicinity of, on, and downstream from, Defendant's discharges.

17  
18 22. Plaintiff Cathy DeForest owns land near to land owned  
19 by Defendant City of Ashland, on which the Ashland Gun Club  
20 Inc. operates a shooting range.

21  
22 23. Plaintiff has standing in this suit to protect her own  
23 interests. Plaintiff's interests are adversely affected by  
24 Defendant's discharges to water, which degrade the receiving  
25 waters as fish and wildlife habitat, recreational resources, and  
26 sources of aesthetic benefits. Plaintiff's interests are adversely  
27 affected by Defendant's handling and disposal of lead shot and  
28 lead bullets. The interests of Plaintiff DeForest have been  
adversely impacted as described in paragraph 24 below.

1  
2       24. The recreational and environmental interests of Plaintiff  
3       Deforest have been, are being, and will be adversely affected by  
4       Defendant's unpermitted discharges of lead into the ground and  
5       water and waste handling and disposal practices. Plaintiff uses,  
6       enjoys and recreates along Emigrant Creek and Bear Creek and  
7       their tributaries in the immediate vicinity of and downstream from  
8       defendants City of Ashland's property which is leased to the  
9       Ashland Gun Club Inc. Defendant's discharges, adversely affect  
10      Plaintiff DeForest's interests, including but not limited to, the  
11      following:

12             (a) Plaintiff DeForest observes and enjoys wildlife, including  
13       birds, in and

14       around Emigrant Creek and its tributaries in the immediate  
15       vicinity of, and downstream from, Defendant's discharges.

16             (b) Plaintiff DeForest has an aesthetic interest in the natural  
17       beauty and biodiversity of the receiving waters in the vicinity of  
18       and downstream from Defendant's discharges;

19             (c) Plaintiff DeForest observes and enjoys wildlife in and  
20       around her property which is in the immediate vicinity of  
21       locations where Defendant has disposed of lead shot and lead  
22       bullets in the land and water;

23             (d) Plaintiff DeForest has an aesthetic interest in the natural  
24       beauty and biodiversity of her property and its surroundings.

25       25. Plaintiff Leon Pyle owns land near to land owned by  
26       Defendant City of Ashland, on which the Ashland Gun Club Inc.

1           operates a shooting range.

2         26. Plaintiff Pyle has standing in this suit to protect his own  
3           interests. Plaintiff's interests are adversely affected by  
4           Defendant's discharges to water, which degrade the receiving  
5           waters as fish and wildlife habitat, recreational resources, and  
6           sources of aesthetic benefits. Plaintiff's interests are adversely  
7           affected by Defendant's handling and disposal of lead shot and  
8           lead bullets. The interests of Plaintiff Pyle have been adversely  
9           impacted as described in paragraph 27 below.

10         27. The recreational and aesthetic interests of Plaintiff Pyle  
11           have been, are being, and will be adversely affected by  
12           Defendant's unpermitted discharges of lead into the ground and  
13           water and waste handling and disposal practices. Plaintiff uses,  
14           enjoys and recreates along Emigrant Creek and Bear Creek and  
15           their tributaries in the immediate vicinity of and downstream  
16           from, defendants City of Ashland's property which is leased to  
17           the Ashland Gun Club Inc. Defendant's discharges, adversely  
18           affect Plaintiff Pyle's interests, including but not limited to, the  
19           following:

20             (a) Plaintiff Pyle observes and enjoys wildlife in and around  
21           Emigrant Creek and its tributaries in the immediate vicinity of,  
22           and downstream from, Defendant's discharges;

23             (b) Plaintiff Pyle has an aesthetic interest in the natural  
24           beauty and biodiversity of the receiving waters in the vicinity of  
25           and downstream from Defendant's discharges;

26             (c) Plaintiff Pyle observes and enjoys wildlife in and around

his property in the immediate vicinity of locations where Defendant has disposed of lead shot and lead bullets in the land and water;

(d) Plaintiff Pyle has an aesthetic interest in the natural beauty and biodiversity of his property and its surroundings.

## **DEFENDANTS**

28. Defendant, City of Ashland ("City") is a municipal subdivision of the State of Oregon. The City owns 65 acres of land along Emigrant Creek. It has leased 32 acres to the Ashland Gun Club Inc. for the use of a gun club.

29. Defendant, Ashland Gun Club Inc. leases the City's land and operates a shooting range at 555 Emigrant Creek Road, approximately two miles east of the City of Ashland, Oregon.

30. Defendants Chuck Partier, Bill Longiotti, Rick Georges, Lee Tuneberg, Mel Winner, Raymond Renteria and Jerry Wisdom are being sued as individuals and are board members of the Ashland Gun Club, Inc.

## **FACTS**

31. The Ashland Gun Club's shooting range includes numerous rifle ranges, a shotgun range and numerous pistol ranges.

32. Shooting of some kind has taken place at the City's property by the Ashland Gun Club, Inc. since at least 1964.

1           33. Emigrant Creek flows in a westerly direction through the  
2           City's property.

3           34. Shortly downstream from City's property, Emigrant  
4           Creek flows into Bear Creek, which flows into the Rogue River.

5           35. The general fire of the shotgun range and rifle ranges is  
6           toward Emigrant Creek.

7           36. The general fire of all of the ranges is into or toward  
8           jurisdictional wetlands that are waters of the United States and  
9           waters of the State of Oregon.

10          37. The shotgun range includes a "clay pigeon" range where  
11           the general direction of fire is towards Emigrant Creek.

12          38. Bullets, shot, shell casings and debris from clay targets  
13           are "pollutants" as that term is defined under the Clean Water  
14           Act.

15          39. The shooting of firearms at the City's property has  
16           resulted and will continue to result in numerous and repeated  
17           discharges of pollutants (including, but not limited to, bullets,  
18           shot, shell casings and debris from clay targets) to waters of the  
19           United States, including, but not limited to discharges to  
20           Emigrant Creek and its associated wetlands.

21          40. Defendants are responsible for the aforementioned  
22           discharges.

1           41. Defendants do not have a National Pollution Discharge  
2           Elimination System (NPDES) permit issued pursuant to the  
3           Clean Water Act that allows them to discharge pollutants into  
4           the waters of the United States.

5           42. Defendant's violations of the Clean Water Act have been  
6           numerous and repeated.  
7

8           43. Because of Defendant's history of repeated discharges  
9           in the absence of an NPDES permit, Plaintiff believes and  
10          alleges that, without the imposition of appropriate civil penalties  
11          and issuance of an injunction, defendant will continue to violate  
12          the Clean Water Act on a regular or intermittent basis to the  
13          further injury of Plaintiff and others. Prior to the trial, Plaintiff  
14          intends to amend this complaint to include any previously  
15          undiscovered violations and/or violations occurring subsequent  
16          to the most recent information available at the time that this  
17          complaint was prepared.  
18

19          44. All of Defendant's aforementioned discharges to waters  
20          are discharges from point sources into navigable waters of the  
21          United States within the meaning of Section 301 of the Clean  
22          Water Act, 33 U.S.C. Section 1311.

23          45. Emigrant Creek constitutes "waters of the United States."

25          46. Lead bullets and lead shot are "solid waste" as that term  
26          is defined under the Solid Waste Disposal Act.  
27  
28

1           47. Lead bullets and lead shot are "hazardous waste" as that  
2 term is defined under the Solid Waste Disposal Act.

3           48. The shooting of firearms at the City's land by the  
4 Ashland Gun Club Inc. has resulted and will continue to result in  
5 the disposal of lead bullets, lead shot, shells and clay pigeon  
6 debris onto Plaintiff's and Defendant's property.  
7

8           49. Defendants are responsible for the aforementioned  
9 disposal of lead bullets, lead shot, shells and clay pigeon debris  
10 onto Plaintiff's and Defendant's property.  
11

12           50. Defendant's handling and disposal of lead bullets and  
13 lead shot presents an imminent and substantial endangerment  
14 to health and/or the environment.  
15

16           51. The Southern Oregon/Northern California Coasts Coho  
17 ("Coho") Evolutionary Significant Unit ("ESU") was listed as  
18 "threatened" under the Endangered Species Act ("ESA") on May  
19 6, 1997.  
20

21           52. Critical habitat that includes Emigrant Creek was  
22 established for the Coho on May 5, 1999.  
23

24           53. The discharge of lead shot and bullets and debris from  
25 clay targets into the ground and water and the resulting  
26 contamination of the ground and water constitute a "take" of the  
27 Coho within the meaning of Section 9 of the Endangered  
28 Species Act, 16 U.S.C. 1538.

1           54. The shooting of firearms at the City's land by the  
2 Ashland Gun Club Inc. has resulted and will continue to result in  
3 the "take" of Coho in Emigrant Creek.

4           55. Defendants are responsible for the aforementioned  
5 "take" of Coho salmon on Emigrant Creek.

7           56. Since at least 2000, Defendants, with the aid of  
8 construction equipment, have repeatedly discharged fill material  
9 below the ordinary high water mark of Emigrant Creek and into  
10 jurisdictional wetlands which are connected to Emigrant Creek.  
11 This discharge of fill material occurred along the entire south  
12 bank of Emigrant Creek within the City's property. This fill  
13 included street sweeper debris and other fill from Defendant City  
14 and the scraping and fill of other areas by the Ashland Gun Club  
15 Inc. in order to make shooting ranges on the property.

16  
17           57. Defendants did not obtain a dredge and fill permit  
18 authorizing the filling activities described in the preceding  
19 paragraph from the United States Army Corps. of Engineers  
20 ("Corps"), nor did Defendants obtain a fill removal permit  
21 authorizing the filling activities from the Oregon Division of State  
22 Lands ("DSL") prior to engaging in these filling activities, nor has  
23 Defendant City obtained such permits from the Corps. or DSL  
24 since engaging in these filling activities.

25  
26           58. Emigrant Creek and the interconnected jurisdictional  
27 wetlands constitute "waters of the United States" as that term is  
28 interpreted under the Clean Water Act.

1           59. Emigrant Creek constitutes "waters of this state" as that  
2 term is defined by Oregon Revised Statutes, Section  
3 196.800(14).

4           60. The fill material discharged by Defendants constitutes  
5 "pollutants" as that term is interpreted under the Clean Water  
6 Act.  
7

8           61. The construction equipment used by Defendants in  
9 discharging fill material into the wetlands on the south side of  
10 Emigrant Creek constitutes "point sources" as that term is  
11 interpreted under the Clean Water Act.  
12

13           62. At least 100,000 cubic feet of fill material discharged by  
14 Defendants to the wetlands on the south side of Emigrant Creek  
15 remains there today, below where the ordinary high water mark  
16 was located prior to Defendant City's discharge of fill material  
17 beginning in 2000.  
18

19           63. Defendants are responsible for the aforementioned  
20 discharges.  
21

22           64. In light of Defendants City's discharges in the absence of  
23 a dredge and fill permit or fill-removal permit, Plaintiffs believe  
24 and allege that, without the imposition of appropriate civil  
25 penalties and issuance of an injunction, Defendant City will  
26 continue to violate the Clean Water Act to the further injury of  
27 Plaintiffs and others. Prior to trial, Plaintiffs intend to amend this  
28 complaint to include any previously undiscovered violations

1 and/or violations occurring subsequent to the most recent  
2 information available at the time this complaint was prepared.

3  
4 65. All of Defendants' aforementioned discharges to waters  
5 are discharges from point sources into navigable waters of the  
6 United States within the meaning of Section 301 of the Clean  
7 Water Act, 33 U.S.C. § 1311.  
8

9 66. Defendants City and Ashland Gun Club Inc. have owned  
10 and operated the shooting range in a manner that has created  
11 nuisances in the forms of noise from gunfire; pollution of water  
12 with lead, arsenic and other hazardous materials; and risk of  
bullet strikes beyond the boundaries of Defendant's land.  
13

14 67. Defendants City and Ashland Gun Club Inc. operated the  
15 shooting range without adequate supervision of individuals to  
16 prevent unlawful and unauthorized activity at the shooting range.  
17

18 68. Defendant's ownership and operation creates extremely  
19 loud and shocking noises from gunfire.  
20

21 69. Defendant's ownership and operation of the shooting  
22 range has regularly continuously, and repeatedly caused errant  
23 bullets and a zone of danger of bullet strikes on Plaintiff's land,  
24 placing Plaintiff at unreasonable risk of bullet strikes without  
warning.  
25

26 70. Defendant's shooting activities at the shooting range  
27 creates trespass by bullet strikes and trespassory noise which  
28 intrudes upon Plaintiff's land.

71. Defendant's shooting activities at the shooting range creates trespassory contamination with hazardous substances, which intrude upon Plaintiff's land.

72. Defendant's actions harmed Plaintiffs by causing loss of the use and enjoyment of his land, loss of exclusive possession of their land, diminution in the value of his land, mental anguish from enduring Defendant's invasions and interferences, and continuing and consequential damages.

COUNT 1

# **Discharge of Pollutants Not Authorized by a NPDES Permit**

73. Plaintiffs incorporate by reference paragraphs 1 through  
72.

74. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, except in compliance with various enumerated sections of the Clean Water Act. Section 301(a) prohibits, *inter alia*, such discharges not authorized by an NPDES permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

75. Oregon Revised Statutes § 468B.050 prohibits the discharge of any pollutant unless such discharge is specifically permitted in an NPDES permit.

76. Defendant's discharges have violated and continue to violate Section 301(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and ORS 468B.050.

## COUNT 2

# **Past and Present Handling and Disposal of Solid and Hazardous Waste Which Presents an Imminent and Substantial Endangerment to Health or the Environment**

77. Plaintiffs incorporated by reference paragraphs 1 through 76.

78. Section 7002(a)(1)(B) of the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B), prohibits contribution to the past or present handling or disposal of any solid or hazardous waste which may present and imminent and substantial endangerment to health or the environment.

79. Defendant's handling and disposal of lead bullets, lead shot, shells and clay pigeon debris have been in violation of, and continue to be in violation of Section 7002(a)(1)(B) of the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B).

COUNT 3

## **Contamination of land, soil and water constitutes “take” of threatened Coho Salmon**

80. Plaintiffs incorporate by reference paragraphs 1 through  
79.

81. Section 9 of the Endangered Species Act, 16 U.S.C. 1538(a)(1)(B) prohibits the “take” of threatened Coho Salmon without a permit.

82. Defendants do not possess a permit to "take" threatened Coho Salmon.

83. Defendants' activities at the gun club property, including the discharge of lead shot, lead bullets, shells and clay pigeon debris into the waters of Emigrant Creek constitutes a "take" of threatened Coho salmon.

84. Defendant's discharge of lead shot, lead bullets and clay pigeon debris into the waters of Emigrant Creek have been a violation of, and continue to be in violation of section 9 (a)(1)(B) of the Endangered Species Act, 16 U.S.C. 1538 (a)(1)(B).

COUNT 4

## **Discharge of Pollutants not Authorized by Federal or State Fill Permit**

85. Plaintiffs incorporate by reference paragraphs 1 through and including paragraph 84.

86. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, except in compliance with various enumerated sections of the Clean Water Act. Section 301(a) prohibits, inter alia, such discharges not authorized by a dredge and fill permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344.

87. Oregon's Removal-Fill Law (ORS §§ 196.800-196.990) prohibits the filling of any "waters of this state without a permit issued under authority of the Director of the [Oregon] Division of State Lands." ORS § 196.810(1)(a).

88. Defendants' discharges have violated and continue to violate Section 301(a) the Clean Water Act, 33 U.S.C. §§ 1311(a), and Oregon Revised Statutes § 196.810(1)(a).

**COUNT 5**

## **Private Nuisance (Kerwin only)**

89. Plaintiffs incorporate by reference paragraphs 1 through

88.

90. Plaintiff suffers significant harm from the invasion of his interest in the private use and enjoyment of his land as a direct result of the following private nuisances emanating from Defendant's shooting range: noise, water pollution, other pollution, and risk of bullet strikes.

COUNT 6

## **Public Nuisance**

91. Plaintiffs incorporate by reference paragraphs 1 through  
90.

92. Defendant's conduct causes significant interferences with the public health, safety, peace, comfort, and convenience and is of a continuing nature that the Defendant knows, or has reason to know, is of a type that has a significant detrimental effect upon these public rights. This unreasonable interference with these common rights of the general public directly results from the public nuisances emanating from Defendant's shooting range, including those of gunfire noise, water pollution, land pollution and risk of bullet strikes as more fully set forth above. Plaintiffs have suffered harms of a kind different from and in addition to that suffered by other members of the public

exercising their common rights; their standing on private nuisance as set forth above confers standing on public nuisance arising out of the same activity.\

COUNT 7

## **Trespass (Kerwin only)**

93. Plaintiffs incorporate by reference paragraphs 1 through  
92.

94. Plaintiff Kerwin suffer significant harm from the invasion of his interest in the exclusive possession of his land as a direct result of the following regular, continuous, and repeated trespasses by the Defendant Ashland Gun Club, Inc. : trespassory noise, which intrudes upon Plaintiff's land; trespassory contamination with hazardous substances, which intrude upon Plaintiff's land: and trespassory errant bullets, which intrude upon Plaintiff's land.

COUNT 8

## **Negligence**

95. Plaintiffs incorporate by reference paragraphs 1 through  
94.

96. Defendants breached their duty of reasonable care to avoid harm to others by negligently or recklessly operating its shooting range, and by failing to adequately supervise those using it so as to prevent unlawful and unauthorized activity. Defendants' negligence created the nuisances and trespasses

1 as set forth above, and was the proximate cause of Plaintiffs'  
2 reasonably foreseeable harm.

3  
4 **COUNT 9**

5 **Negligence Per Se**

6 97. Plaintiffs incorporate by reference paragraphs 1 though  
7 96.

8  
9 98. Plaintiffs are a member of the class intended to be  
10 protected by ORS chapter 468B.005 to 468B.035, the Oregon  
11 Water Pollution Control law, which sets a standard of conduct  
12 and due care applicable to Defendants. The foreseeable harm  
13 caused to Plaintiffs is of the kind that the stated Oregon law is  
14 intended to prevent. Defendant violated the stated Oregon law in  
15 its operation of its shooting range, which directly caused  
16 pollution of Emigrant Creek and associated waters.

17  
18 **RELIEF REQUESTED**

19  
20 WHEREFORE, Plaintiff respectfully requests this Court to grant  
21 the following relief:

22 A. Issue a declaratory judgment that Defendants have  
23 violated and continue to be in violation of Section 301 of the  
24 Clean Water Act, 33 U.S.C. § 1311, Oregon Revised Statutes §  
25 468B.050, Section 7002(a)(1)(B) of the Solid Waste Disposal  
26 Act, 42 U.S.C. § 6972(a)(1)(B), and section 9 (a)(1)(B) of the  
27 Endangered Species Act, 16 U.S.C. 1538 (a)(1)(B).

1           B.     Enjoin Defendants from operating its shooting range in  
2     such a manner as will result in further violation of the Clean  
3     Water Act, Endangered Species Act and the Solid Waste  
4     Disposal Act and enjoin Defendant from operating its shooting  
5     range in a manner causing injury to Plaintiffs or the public as set  
6     out above. In particular, Plaintiffs seeks an order enjoining  
7     Defendants from filling wetlands, from discharging pollutants to  
8     waters of the United States and State of Oregon at its shooting  
9     range without an NPDES permit, requiring remediation of lead  
10    bullets and lead shot so that they no longer pose a threat to  
11    health or the environment and to prohibit the placement of lead  
12    bullets, lead shot and clay pigeon debris into Emigrant Creek  
13    and its tributaries;

14           C.     Issue an injunction requiring Defendants to complete a  
15    full soil, surface water sediment, and groundwater contamination  
16    assessment of its shooting range and adjacent property to  
17    determine the nature and extent of the pollutants that are  
18    discharged to surface waters and soil;

19           D.     Authorize Plaintiff, for the period beginning on the date of  
20    the Court's Order and running for one year after Defendants  
21    achieve compliance with the Clean Water Act, Endangered  
22    Species Act and the Solid Waste Disposal Act, to sample or to  
23    arrange sampling of surface waters, sediments, and soils at, and  
24    in the vicinity of, Defendants' shooting range, with the costs of  
25    the sampling to be borne by Defendants;

26           E.     Order Defendants to provide Plaintiffs, for a period  
27    beginning on the date of the Court's Order and running for one  
28    year after Defendant achieves compliance with the Clean Water  
Act, Endangered Species Act and Solid Waste Disposal Act,  
with a copy of all reports and other documents which Defendant

1 submits to EPA, or DEQ regarding Defendants' discharges,  
2 NPDES permit, or regarding lead bullet and lead shot wastes at  
3 the time they are submitted to these authorities;

4 F. Issue a remedial injunction ordering Defendants to pay  
5 the cost of any environmental restoration or remediation  
6 deemed necessary and proper by the Court to ameliorate the  
7 surface water, sediment, soil, and environmental degradation  
8 caused by Defendant's violations;

9 G. Order Defendants to pay civil penalties of \$25,000.00 per  
10 day of violation for each Clean Water Act violation occurring  
11 prior to January 1, 1997, and civil penalties of \$27,500 per day  
12 of violation for each Clean Water Act violation occurring  
13 thereafter, and civil penalties of \$32,500 per day XXX pursuant  
14 to Sections 309(d) and 505(a) of the Clean Water Act, 33  
15 U.S.C. §§ 1319(c) and 1365(a);

16 H. Award Plaintiff its costs, including reasonable attorney  
17 And expert witness fees, as authorized by Section 505(d) of the  
18 Clean Water Act, 33 U.S.C. § 1365(d), SECTION XXX OF THE  
19 ENDANGERED SPECIES ACT and Section 7002(e) of the  
20 Solid Waste Disposal Act, 42 U.S.C. § 6972(e);

21 I. Order Defendant to abate the nuisances alleged herein.

22 J. Award compensatory damages to Plaintiff for loss in the  
23 value of his land and for loss of value for the diminished use  
and enjoyment of his land;

24 K. Award Plaintiff non-economic damages for mental  
anguish suffered;

25 L. Award Plaintiff consequential damages;

26 M. Award Plaintiff costs and disbursements; and

27 N. Award such other relief as this Court deems appropriate.

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Dated this 23rd day of December, 2011.

Respectfully submitted,

Thomas Dimitre

Attorney at Law L.L.C.